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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

INTERNATIONAL SALT COMPANY, INCORPORATED,
Appellant,
against
UNITED STATES OF AMERICA.

No. [redacted] 46

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM 1946

INTERNATIONAL SALT COMPANY, INCORPORATED,
Appellant,

against

UNITED STATES OF AMERICA.

No. 1076

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

This is an appeal by defendant, International Salt Company, Incorporated, (hereinafter referred to as "International Salt") from a judgment of the United States District Court for the Southern District of New York granting a motion for summary judgment made by plaintiff below. The action was originally brought against two individual defendants, in addition to the defendant-appellant, but was dismissed as against the individual defendants by consent (R. 25).

An appeal was also taken from the judgment of the District Court by the plaintiff below, United States of America, based on certain assignments of error filed by plaintiff (R. 44, 45). Said appeal by plaintiff below has been dismissed by consent since the filing of the transcript of record.

Opinion Below

The opinion of the District Court is reported in 6 F.R.D. 302 (1946), and is printed at R. 26.

Jurisdiction

The judgment of the District Court was entered and filed on December 27, 1946 (R. 36). An order of the District Court allowing this appeal was entered January 23, 1947 (R. 42), and this Court noted probable jurisdiction on April 28, 1947 (R. 50). This Court has jurisdiction by virtue of Sec. 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823, 36 Stat. 1167, 15 U. S. C. Sec. 29), and Section 238 of the Judicial Code, as amended (36 Stat. 1157, 38 Stat. 804, 43 Stat. 938, 28 U. S. C. Sec. 345).

Statement of the Case

A. The Pleadings

The complaint alleges that defendant International Salt manufactures and distributes a patented machine known as the Lixate Process Dissolver (hereinafter referred to as the "Lixator"), which dissolves rock salt, a raw material sold by defendant, International Salt, and other companies, into a salt brine solution, and also manufactures and distributes a patented machine known as the Saltomat Automatic Salt Dissolver (hereinafter referred to as the Saltomat), which is used as a dispenser of salt tablets (R. 4); that said machines and rock salt and salt tablets for use in said machines are shipped by said defendant in interstate commerce to customers throughout the United States (R. 5), and that the Lixator and

Saltomat machines are leased by defendant under a form of lease agreement applicable to the respective machines. (Exhibit A to complaint, R. 11; Exhibit B to complaint, R. 12). It further alleges that said lease agreements are in violation of Sec. 1 of the Sherman Anti-Trust Act, and Sec. 3 of the Clayton Act by reason of certain terms in said agreements providing that said machines shall be used only in conjunction with the rock salt and salt tablets purchased from the defendant International Salt, and that by bringing about, maintaining and carrying out the aforesaid agreements defendant intended to and did suppress and restrain competition in the sale of rock salt and salt tablets by tying the use of the said unpatented raw materials to the use of the aforesaid patented machines, and has substantially lessened competition in the sale of rock salt and salt tablets to the aforesaid lessees of Lixators and Saltomats (R. 5, 7, 8).

As appears from the complaint and the exhibits attached thereto, the Lixator leases contain a provision that in the event of a general reduction in price of grades of salt suitable for use in the Lixator, the lessee shall give the lessor an opportunity to provide a competitive grade of salt at any such competitive price quoted, and in case the lessor shall fail or be unable to do so, the lessee upon continued payment of the rental agreed upon shall have the privilege of continued use of the leased equipment with salt purchased in the open market until such time as the lessor shall furnish a suitable grade of salt at the competitive price (R. 6, 11). The Saltomat lease provides that if at any time during the term of the lease, a general reduction in lessor's price of salt tablets suitable for use in the Saltomat shall be made, the lessor shall provide lessee with salt tablets at a like price (R. 7, 12).

In the prayer for relief (R. 9), the plaintiff asks that the defendant be perpetually enjoined from participating in, maintaining or carrying out the restrictions in said form lease agreements, and for other alleged incidental relief which has been granted, in part, by the Court below.

The answer, in addition to the denials and admissions, pleads an affirmative defense (R. 16) the allegations of which, for the purposes of this appeal, must be deemed admitted, the Court below having granted plaintiff's motion for summary judgment and no affidavits having been submitted by either party. The allegations of this affirmative defense and the defendant's admissions are discussed hereafter under the Statement of Facts.

B. The Judgment

The judgment of the District Court finds that all the provisions of the lease agreements of the Lixator and Saltomat machines which contain any condition, agreement or understanding that the lessee shall not use or deal in salt of a competitor or competitors of defendant, International Salt, are unlawful, and declared illegal and void (R. 36, 37). It perpetually enjoins the defendant International Salt, its directors, officers, agents, employees, representatives, successors, subsidiaries, assignees of the rights of the defendant corporation under any lease of any Lixator or Saltamat machine and any person acting or claiming to act for or on behalf of the defendant (R. 37):

(a) From enforcing or attempting to enforce any provision of the agreements adjudged unlawful, and from doing any further acts thereunder;

(b) From entering into any contract, agreement, or lease for Lixator or Saltomat machines, or any machine performing the same or similar functions, for use or resale within the United States, or any place under the jurisdiction of the United States, or from fixing a price, rental, or fee charged therefor or discount from or rebate on such price, rental or fee, upon the condition, agreement, or understanding, directly or indirectly, that the lessee, purchaser, or user thereof shall not purchase, use, or deal in salt of a competitor or competitors of defendant, International Salt.

(c) From engaging in or participating in contracts, agreements, or understandings, having the purpose or effect of continuing, revising, or renewing any agreement, condition, or understanding adjudged to be unlawful by said judgment.

(d) From removing said machines from the premises of any lessee, purchaser, or user thereof, because such lessee, purchaser, or user purchases, uses or deals in salt manufactured or sold by any person, firm or corporation other than defendant, International Salt.

(e) From using patents or patent rights owned or controlled by the defendant embodying inventions used or useful in the Lixator or Saltomat machines, or any machine performing a function similar to either of them to control, restrict or limit in any way the purchase of salt from any person, firm or corporation other than defendant, International Salt.

(f) From instituting or threatening to institute any action, suit or proceeding for infringement, or to collect charges, damages, compensation or royalties alleged to

have occurred or accrued prior to the date of the entry of said judgment under any U. S. patents owned or controlled by the defendant disclosing an invention used or useful in the Lixator or Saltomat machines or any machine performing a function similar to either of them.

The judgment also directs (Par. VI, R. 38) defendant, International Salt, to offer to lease or sell or license the use of the Lixator or Saltomat machines, or any other machine which is then being or about to be offered or shall have been offered by such defendant in the United States embodying inventions covered by any of the patents referred to in the judgment, to any applicant on non-discriminatory terms and conditions, providing that a machine or machines is or are available for such purposes; that defendant shall not be required to make such offer unless it is offering, about to offer, or has offered such machines for lease or sale or license within the United States and at any time the defendant may discontinue the business of renting or selling or licensing the use of such machines; that such sale or lease or license is not required to be made without cash payment or security to any person not having proper credit rating; and provided further that the rental or sale price or license royalty may differ as to different types and sizes of machines and from time to time so long as the rental or sale price or royalty at any one time is uniform as to each size or type of machine. Any person with whom International Salt now has a lease agreement relating to the Lixator or Saltomat may elect to retain his rights under the existing lease or to enter into a new lease or sale or license contract with defendant, International Salt, in accordance with the provisions of said Paragraph VI of the judgment.

The order of the District Court allowing this appeal, filed January 24, 1947, stayed the enforcement of said judgment pending the disposition of the appeal upon the filing by appellant and approval by said court of a bond in the sum of $250 (R. 43), which bond was filed and approved.

C. Statement of Facts

The judgment of the District Court granted a motion by plaintiff for summary judgment which, in effect, was a motion for judgment on the pleadings. No testimony was taken, and no affidavits were submitted by either party. The facts before the District Court consisted of the allegations of the complaint, in so far as they are admitted in defendant's answer, the allegations of the affirmative defense set forth in defendant's answer which, for the purposes of this appeal, must be deemed to be admitted, and the statement of admissions filed by the defendant in response to a Request for Admissions by plaintiff below under Rule 36 of the Rules of Civil Procedure (R. 20, 23). This includes photostatic copies of the 50 Lixator leases made by defendant, International Salt, and in effect at the time of the commencement of the action which vary in terms from the printed form of lease contract. These 50 photostatic copies of leases have been filed in this Court as part of the record on appeal, but have not been printed. The parties have stipulated that either party is permitted to refer to, quote from, or reproduce any of said exhibits in whole or in part in its briefs or oral argument as fully as though they were included in the printed record (R. 48).

The material facts contained in the record are as follows:

Defendant, International Salt, is a New Jersey corporation with offices in New York City, and is engaged in the business of manufacturing and supplying salt for industrial, agricultural and home purposes. It is the largest producer of salt for industrial uses in the United States (R. 14).

International Salt is also engaged in the manufacture and distribution of the Lixator machine referred to in the complaint, which it manufactures under patents owned by it (R. 4). The other machine referred to in the complaint, known as the Saltomat, is manufactured for the defendant under a patent which it owns (R. 23). Both the Lixator and Saltomat machines are leased by International Salt under standard forms of lease, although in the case of the Lixator the leases in some instances vary from the standard form.

In 1944 Defendant, International Salt, sold approximately 119,000 tons of salt, having an approximate value of $500,000 for use in said Lixator and Saltomat machines (R. 16).

(a) *The Lixator Leases*

The Lixator is a machine which dissolves rock salt into a salt brine solution. Defendant, International Salt, manufactures and sells rock salt suitable for use in these machines. Lixators are leased by International Salt, in most instances, under a standard form of lease, a copy of which is annexed to the complaint marked Exhibit A (R. 11). The lease is at a specified annual rental for five years, payable yearly in advance. After the expiration of the five year period, the rental is at the rate of $1 per year. The standard form of Lixator lease contains the following provisions:

"It is further mutually agreed that the said Lixator Process Dissolver shall be installed by and at the expense of said Lessee and shall be maintained and kept in repair during the term of this lease by and at the expense of said Lessee; that the said Lixate Process Dissolver shall be used for dissolving and converting into brine only those grades of rock salt purchased by the Lessee from the Lessor at prices and upon terms and conditions hereafter agreed upon, PROVIDED:

If at any time during the term of this lease a general reduction in price of grades of salt suitable for use in the said Lixate Process Dissolver shall be made, said Lessee shall give said Lessor an opportunity to provide a competitive grade of salt at any such competitive price quoted, and in case said Lessor shall fail or be unable to do so, said Lessee, upon continued payment of the rental herein agreed upon, shall have the privilege of continued use of the said equipment with salt purchased in the open market, until such time as said Lessor shall furnish a suitable grade of salt at the said competitive price.

It is further mutually agreed: that the said Lixate Process Dissolver is and shall continue to be the exclusive property of said Lessor and can not be sold, loaned or otherwise transferred to any other person or corporation without the written consent of said Lessor; that should said Lessee fail to pay promptly the aforesaid rental, or shall at any time discontinue purchasing its requirements of salt from said Lessor, or otherwise breach any of the terms and conditions of this lease, said Lessor shall have the right, upon thirty days' written notice of intention to do so, to remove the said Lixate Process Dissolver from the possession of said Lessee."

At the time this action was commenced, International Salt had outstanding 840 lease contracts each covering one Lixator. 790 of these lease contracts are on the standard form of Lixator lease above referred to, while 50 of them vary in terms from the printed form (R. 20, 23). These 50 leases will be referred to by the numbers given them in Exhibit I annexed to the plaintiff's Request for Admissions (R. 21).

In four of these leases, Nos. 7, 15, 23, and 46, the so-called "tying" clause is omitted entirely. In three leases, Nos. 6, 40 and 41, the agreement is to purchase only 50% of the lessee's requirements, while in one lease, No. 50, the agreement is to purchase the bulk of the salt used from the lessor. In nine leases, Nos. 14, 16, 17, 18, 19, 21, 47, 48 and 49 the clause permitting removal of the Lixator in the event of violation by the lessee of the agreement to use in the Lixator only salt purchased from the lessor is omitted or stricken out. Five leases with Armour & Co. Nos. 12, 24, 25, 26 and 27, provide that the lessee may use salt produced by the Armour properties. In two leases, No. 29 dated January 25, 1937, and No. 44 dated March 23, 1936, the Lixator, after the expiration of the five year period becomes the property of the lessee and the provisions of the lease agreement terminate. In five leases, Nos. 22, 28, 30, 43 and 45, the lessee is given the right of cancellation upon notice to the lessor. In one lease (No. 35) the right of cancellation is given to the lessee, if the salt furnished by the lessor for the Lixator should prove unsatisfactory. Other variations are as to such matters as additional equipment furnished by the lessor and variations in the rental term.

International Salt has in many instances sold the Lixator outright where the customer has objected to leas-

ing the machine, and without any agreement as to the source from which the rock salt for use in such Lixator was to be purchased (R. 16). It has in some instances refused to sell the Lixator machine (R. 16) but it has never refused to install a Lixator because the customer objected to signing a lease on the standard form (R. 17). In many instances, moreover, lessees have purchased rock salt for use in the leased Lixator from sources other than the defendant, International Salt, to the knowledge of said defendant, and in no instance has International Salt removed or attempted to remove or threatened to remove the machine from the possession of the lessee (R. 17).

Defendant in its answer denies all the allegations of the complaint as to illegality of the lease agreements and restraint of trade and commerce (complaint, Par. 10, R. 5; answer, Par. 7, R. 15), and also the allegations that in bringing about, maintaining and carrying out the lease agreements defendant intended to and did lessen competition in the sale of salt and salt tablets, prevent other manufacturers of salt and salt tablets for use in the Lixator or Saltomat from selling their products to users of said machines in competition with defendant International Salt, prevent the users of said Lixators and Saltomats from purchasing salt and salt tablets suitable for use therein from any company except the defendant, International Salt, and on any prices or terms except those fixed by defendant, International Salt, and suppress and restrain competition in the sale of salt and salt tablets by tying the use of said unpatented raw materials to the use of the aforesaid patented machines (complaint, Pars. 17-20, R. 7, 8; answer, Par. 13, R. 16).

The answer further alleges that defendant, International Salt, in entering into agreements for the lease of the

Lixator machine had no purpose or intent to create a monopoly in the sale of rock salt or to restrict trade and commerce in rock salt, but only to secure for defendant, International Salt, the opportunity to meet competitive prices. It further alleges that the making of such leases did not in fact result in creating any monopoly or restraining trade or commerce in such product (R. 16).

By leasing the Lixator machines rather than selling them outright, International Salt is enabled to require the machine to be kept in good order and repair by the lessee and to have the machine inspected from time to time by its qualified engineer to determine its condition and whether it is functioning properly, thereby insuring to the customer a satisfactory operation of the machine, and protecting the good-will of the lessor with said customer and with the trade (R. 17).

The Lixator is used by the lessees for the purpose of making brine from rock salt through a process owned and promoted by International Salt known as the "Lixate Process". In using such process, it is of extreme importance that rock salt be used of a standard and uniform chemical analysis in order to insure a constant and dependable supply of brine of uniform quality and concentration. The rock salt produced at the mines of International Salt is produced after careful investigation of the salt deposit prior to the actual mining so as to guarantee a grade of salt consistently high in Sodium Chloride content, with the result that the rock salt produced from defendant's mines has an average Sodium Chloride content of 98.2% or higher (R. 17).

The rock salt produced by other mining concerns does not run consistent in Sodium Chloride content and, in many instances, runs as low as 95% Sodium Chloride.

Rock salt of a lower Sodium Chloride content contains a greater amount of insoluble impurities which must be disposed of through the sludge-disposal of the Lixator. In distributing its Lixators, International Salt advises its lessees as to certain fixed intervals at which the sludge disposal should be operated, these intervals being based on the chemical content and analysis of the rock salt produced by defendant. If another salt, with a lower Sodium Chloride content and with more impurities is used in such Lixator, it will require an alteration in the control of the sludge disposal if the Lixator is to operate in a satisfactory manner. Moreover, the use of such impure salt will affect adversely the amount of concentrated brine produced by the Lixator. The successful operation of the Lixator, therefore, and of the defendant's Lixate process used in producing a brine from such machine is dependent on the use of rock salt produced by the defendant, International Salt, with its high Sodium Chloride content and fewer impurities (R. 17, 18).

(b) *The Saltomat Leases*

The Saltomat machines are manufactured for the defendant, International Salt, under a patent owned by said defendant (R. 23).

These machines are used to inject salt in specific and uniform quantities into canned products during the process of canning, the salt being put into the Saltomat machine in the form of salt tablets (R. 18).

International Salt leases these machines under a standard form of lease, copy of which is annexed to the complaint marked Exhibit B (R. 12). These leases are for the term of one year, or part thereof, at a specified rental

payable yearly in advance. The lease also contains the following provisions:

"It is further mutually agreed that the said Salt Tablet Depositor(s) shall be installed and maintained in good condition during the term of this lease; that the said Salt Tablet Depositor(s) shall be used only in conjunction with Salt Tablets sold or manufactured by the Lessor, and that the Lessee shall purchase from the Lessor, or its agent, Salt Tablets for use in the Salt Tablet Depositor(s) at prices and upon terms and conditions hereinafter agreed upon, PROVIDED:

If, at any time during the term of this lease, a general reduction in Lessor's price of Salt Tablets suitable for use in the Depositor(s) shall be made, said Lessor shall provide said Lessee with Salt Tablets at a like price.

It is further mutually agreed that Lessor shall be under no liability to anyone for injury resulting from said machine or the use thereof while it is in Lessee's custody or possession, and the Lessee agrees to hold Lessor harmless from any such claim of liability and all expense resulting therefrom or in connection therewith; that the said Salt Tablet Depositor(s) is (are) and shall continue to be the exclusive property of said Lessor and cannot be sold, loaned or otherwise transferred to any person or corporation without the written consent of said Lessor; that should Lessee fail to pay promptly the aforesaid rental, or at any time discontinue purchasing its requirements of Salt Tablets for said Salt Tablet Depositor(s) from said Lessor, or its agent, or otherwise breach any of the terms and conditions of this lease, said Lessor shall have the right, upon ten days' written notice of intention to do so, to remove the said Salt Tablet Depositor(s) from the premises and/or possession of said Lessee."

International Salt, at the time of the commencement of this action had in effect 73 lease contracts covering 96 Saltomats, all on this standard form (R. 20, 23).

Defendant in its answer denies the allegations of the complaint as to the illegality of the Saltomat leases and restraint of trade and commerce (R. 5, 15), and the allegations that the defendant in bringing about, maintaining and carrying out the said leases intended to and did lessen, suppress and restrain competition in the sale of salt tablets (complaint, Pars. 17-20, R. 7, 8; answer, Par. 13, R. 16).

The answer further alleges that in entering into said Saltomat leases, defendant International Salt had no purpose or intent to create a monopoly in the sale of salt tablets or to restrain trade or commerce in such salt tablets, but only to secure for defendant the opportunity to meet competitive prices in salt tablets, and that the making of such leases did not in fact result in creating any monopoly or restricting trade or commerce in such product (R. 16).

In some instances defendant has refused to sell Saltomat machines (R. 16), but in no case has it ever refused to install a Saltomat machine because the customer objected to signing a lease on the standard form (R. 16, 17). Moreover, in many instances, lessees of the Saltomat machine have purchased salt tablets for use in such Saltomat from sources other than the defendant, International Salt, to the knowledge of said defendant, and in no such instance has defendant removed or attempted to remove or threatened to remove the machine from the possession of such lessee (R. 17).

By leasing the Saltomat machines rather than selling them outright, International Salt is able to require the

machine to be kept in good order and repair by the lessee and to have the machine inspected from time to time by its qualified engineer to determine its condition and whether it is functioning properly, thereby insuring to the customer a satisfactory operation of the machine and protecting the good-will of International Salt with said customer and with the trade (R. 17).

Moreover, the salt tablets manufactured by defendant, International Salt, are manufactured from high purity evaporated salt made especially to meet the requirements of the canning industry. They contain a minimum of Calcium Sulphate, an impurity which, when used in the process of canning vegetables such as peas and beans, causes a hardening of the skin of the vegetable which is very objectionable to the consumer. Users of Saltomat machines distributed by defendant, International Salt, have a more successful experience with such machines if they use tablets made by International Salt from salt produced by it which contains a minimum of impurities and is especially designed to meet the specifications of the canning industry (R. 18).

Furthermore, in many instances where a stock of salt tablets is carried over by a customer from one canning season to the next, humidity in the storage warehouse will cause the tablets partially to dissolve or to become moist. Those next to the shipping containers, in that event, will adhere to the side of the container and unless protected by a proper coating will pick up impurities such as small pieces of paper from the container. International Salt has overcome this problem by having the containers for its salt tablets made with a glazed interior surface, so that the tendency of the salt tablets when moist to adhere

to the side of the container has been practically eliminated (R. 18, 19). Where salt tablets not produced by defendant, International Salt, and containing impurities or foreign matter from the sides of the container, are used in a Saltomat, such impurities and foreign matter are introduced into the canned products in which the salt tablets are deposited, to the detriment of such products, and this condition is normally not discovered until after the cans are opened by the ultimate consumer, at which time it is impossible for the canner to tell what salt tablets were used in the particular can. In such cases, the blame will be attached to the defendant's machine with a corresponding loss of good-will on the part of International Salt (R. 19).

Specification of Errors, Statement of Issues, and Summary of Argument

In No. 1 appellant assigns as error the granting of the plaintiff's motion for summary judgment (R. 40).

In No. 2 it assigns as error the holding of the District Court that defendant has entered into contracts in restraint of trade, and has used patents and patent rights owned or controlled by it to restrain interstate trade and commerce in rock salt and salt tablets, in violation of Title 15, U.S.C. Sec. 1 and 15 U.S.C. Sec. 14 (R. 40).

In No. 3 it assigns as error the holding of the District Court that all the provisions of the leases of the Lixator and Saltomat machines containing provisions against the lessees using or dealing in salt of a competitor or competitors of the defendant are unlawful, illegal and void (R. 40).

In No. 11 appellant assigns as error the provisions of Paragraph VI of the judgment directing defendant to offer to lease or sell or license the use of the Lixator or Saltomat or similar machine to any applicant on non-discriminatory terms and conditions, and subject to the provisions contained in said Paragraph VI (R. 41).

The appellant intends to urge the foregoing assignments of error upon this appeal.

The contention of the appellant is that there are issues of fact involved on which the defendant is entitled to a trial, viz: (1) whether the Lixator and Saltomat leases do in fact substantially lessen competition or tend to create a monopoly in salt, and (2) whether the restraint of trade effected by these leases, if any, is an unreasonable restraint. In the event that this Court should disagree with appellant's contention, and find that summary judgment was properly granted, appellant objects to the provisions of Par. VI of the judgment appealed from (R. 38) on the ground that the District Court in Par. VI of the judgment exceeded its powers, that the provisions of said paragraph are punitive and not remedial, and that if the granting of such relief was within the power of the District Court it was an abuse of the Court's discretion.

The Statutes

Sec. 1 of the Sherman Anti-Trust Act (26 Stat. 209; 15 U.S.C. Sec. 1) provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal; * * *".

Sec. 3 of the Clayton Act (38 Stat. 730; 15 U.S.C. Sec. 14) provides:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

ARGUMENT

I

The Lixator and Saltomat leases do not *per se* violate the provisions of Section 1 of the Sherman Anti-Trust Act or of Section 3 of the Clayton Act.

Rule 56 of the Federal Rules of Civil Procedure, which prescribes the conditions under which summary judgment may be entered, provides:

> "(c) • • • The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if

any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The Sherman Act (15 U.S.C. Sec. 1) does not prohibit all restraints of trade or competition, but only such as are unreasonable. The question whether an alleged restraint of trade is reasonable or unreasonable is essentially a question of fact.

In *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344 this Court, speaking of the Sherman Act, says (p. 360):

> "* * * The decisions establish, said this Court in Nash *v.* United States, 229 U. S. 373, 376, 'that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade.' * * *"
>
> "* * * In applying this test, a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it. 'The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains.' Chicago Board of Trade *v.* United States, supra. The familiar illustrations of partnerships, and enterprises fairly integrated in the interest of the promotion of commerce, at once occur. The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions. * * *"

and at p. 377:

> "The fact that the suit is brought under the Sherman Act does not change the principles which govern the granting of equitable relief. There must be a 'definite factual showing of illegality'. Standard Oil Co. *v.* United States, 283 U. S. 179 * * *".

See also

> *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238.

Section 3 of the Clayton Act (15 U.S.C. Sec. 14) makes unlawful a provision in the lease that the lessee shall not use or deal in the goods, wares, merchandise, or other commodities of a competitor or competitors of the lessor only where the effect of such a provision "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." It would appear almost academic that such a question is one of fact.

In *Standard Fashion Company* v. *Magrane-Houston Company*, 258 U. S. 346 at p. 356 this Court interpreted Sec. 3 of the Clayton Act as follows:

> "Section 3 condemns sales or agreements where the effect of such sale or contract of sale 'may' be to substantially lessen competition or tend to create monopoly. It thus deals with consequences to follow the making of the restrictive covenant limiting the right of the purchaser to deal in the goods of the seller only. But we do not think that the purpose in using the word 'may' was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would under the circumstances disclosed probably lessen competition, or create an actual tendency to monopoly. That it was not intended to

> reach every remote lessening of competition is shown in the requirement that such lessening must be substantial."

Standard Oil Co. v. *Federal Trade Commission* (C.C.A. 3rd Circ.), 282 Fed. 81, involved the legality under the anti-trust laws of the leases of gasoline storage pumps to filling station proprietors, which leases contained a provision that the equipment should be used solely for the storage and handling of motor gasoline purchased by the lessee from the lessor. The Court held that these leases did not violate Sec. 3 of the Clayton Act. At p. 88 of its opinion, the Court says:

> "But the Clayton Act, when it came along, bore upon another phase of the contract, namely, upon the clause which restricts the use of the leased outfit to the product of the wholesaler, thereby, the Commission found, lessening competition and tending to create a monopoly. Such a clause of a contract, commonly known as a tying contract, is to be construed not by its terms alone but by its effect as well. The Act looks particularly to the consequences. * * *".

The provision in the Lixator and Saltomat leases which plaintiff claims to be illegal and invalid is not literally within the prohibition of Sec. 3 of the Clayton Act. These leases do not prohibit the lessee from using or dealing in rock salt or salt tablets purchased from a competitor of the lessor. The provision in the Lixator lease is that the Lixator shall be used for dissolving and converting into brine only those grades of salt purchased by the lessee from the lessor (R. 11), and in the Saltomat lease that the Saltomat shall be used only in conjunction with salt tablets sold or manufactured by, and purchased from the

lessor (R. 13). There is nothing in these leases which prevents the lessee from obtaining a similar machine from any of lessor's competitors or from buying rock salt or salt tablets from any source he pleases and using them in the operation of any other machine or without any machine.

In *Federal Trade Commission v. Sinclair Refining Co.*, 261 U. S. 463, the Sinclair Refining Co., a manufacturer of gasoline, leased underground tanks and pumps to retail dealers at nominal prices, with a provision that the equipment be used only with gasoline supplied by the lessor. The Federal Trade Commission ordered the Sinclair Co. to cease and desist from leasing its tanks and pumps on this condition on the ground that it was violating Federal Trade Commission Act, Section 5, prohibiting unfair methods of competition, and also Section 3 of the Clayton Act. These orders of the Federal Trade Commission were held invalid by four separate circuit courts of appeals, and on appeal to this Court the judgments of the courts below were affirmed; despite the contention of counsel for the Commission that lessees generally did not encumber themselves with more than one pump and that the practical effect of the restrictive covenant was to confine most dealers to the purchase of gasoline from their lessor. At p. 474 of its opinion, the Court, after discussing among others the decision in *United Shoe Machinery Co. v. United States* (*infra*) says:

> "There is no covenant in the present contract which obligates the lessee not to sell the goods of another; and its language cannot be so construed. Neither the findings nor the evidence show circumstances similar to those surrounding the 'tying' covenants of the Shoe Machinery Company. Many competitors seek to sell excellent brands of gasoline

> and no one of them is essential to the retail business. The lessee is free to buy wherever he chooses; he may freely accept and use as many pumps as he wishes and may discontinue any or all of them. He may carry on business as his judgment dictates and his means permit, save only that he cannot use the lessor's equipment for dispensing another's brand. By investing a comparatively small sum, he can buy an outfit and use it without hindrance. He can have respondent's gasoline with the pump or without the pump, and many competitors seek to supply his needs."

and at p. 475:

> "* * * No purpose or power to acquire unlawful monopoly has been disclosed, and the record does not show that the probable effect of the practice will be unduly to lessen competition. Upon the contrary, it appears to have promoted the public convenience by inducing many small dealers to enter the business and put gasoline on sale at the cross-roads."

In *Pick Mfg. Co.* v. *General Motors Corp.*, 299 U. S. 3, affirming a judgment of the Circuit Court of Appeals for the 7th Circuit, 80 Fed. (2d) 641, the defendant, General Motors Corp. sold Chevrolet cars to its dealers under a contract by which the dealer was required to agree that he would not sell, offer for sale, or use in the repair of Chevrolet motor vehicles and chassis second-hand or used parts, or any part or parts not manufactured by or authorized by the Chevrolet Motor Co., a division of General Motors Corp. This Court affirmed a judgment of the Circuit Court of Appeals holding that this contract provision did not violate Section 3 of the Clayton Act.

The Court below attempted to distinguish the *Sinclair* case on the ground that the pumps in that case were unpatented, whereas the Lixator and Saltomat are patented machines and presumably, therefore, the identical machines could not be procured elsewhere (R. 33). It does not, of course, follow that because a machine is patented no machine capable of doing similar work can be obtained from any one other than the patentee. This is one of the questions of fact on which defendant was entitled to a trial. The Court below also suggested that the pumps in the *Sinclair* case were the vendee's means of resale and there was, therefore, an inducement to obtain additional equipment to satisfy customers' demand for gasoline. We submit that the lessee of a machine to be used in connection with his business would be as anxious to please himself as to please his customers, and that if other rock salt or salt tablets of better quality or at a better price than lessor's were available, the inducement to obtain additional equipment would be equally as great as if the rock salt or salt tablets were being purchased for resale.

The *Sinclair* case, moreover, was not decided on the ground that the so-called "tying" clause in the gas pump leases aided in preventing a fraud on the public, nor has the *Sinclair* case ever been distinguished by this Court on that ground.

International Business Machines Corp. v. *United States*, 298 U. S. 131 is cited in the opinion below as having "severely restricted" the holding of the *Sinclair* and *Pick* cases (R. 32). In the *International Business Machines* case, appellant's machines and those of Remington-Rand were the only ones on the market which performed certain mechanical tabulations and computations without any

intervening manual operation (opinion, p. 133). Both of these corporations were defendants in the action, and each leased machines under leases having similar tying clauses. Moreover, the record showed an agreed use of the tying clause by appellant and its only competitors, and an agreement by each of them to restrict its competition in the sale of cards to the lessees of the other (opinion, p. 135). The Court found, under these circumstances and after a trial of the issues, that there was a violation of the anti-trust laws, and distinguished the *Sinclair* case not merely on the ground that the gasoline in that case was for resale, but on the ground that in the *Sinclair* case there was no restraint upon the purchase and sale of competing gasoline (opinion p. 135). Similarly, in *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451, 458, cited by the District Court (R. 35), the record showed that the defendant, United Shoe Machinery Corp. controlled more than 95% of the shoe machinery business in the United States, and that a shoe manufacturer leasing from that company machinery which might be absolutely essential to the prosecution and success of his business could not acquire machinery from a competitor of the appellant under the provisions of the appellant's lease, except at the risk of forfeiting the right to use the appellant's machines.

See also

Standard Oil Company v. *Federal Trade Commission* (cited *supra*), 282 Fed. 81, 88.

Plaintiff in the court below relied strongly on *Morton Salt Company* v. *G. S. Suppiger Co.*, 314 U. S. 488, and *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661.

The *Morton Salt* case was an action by Morton Salt Co. against G. S. Suppiger Co. for the infringement of a patent and an accounting. The defendant, Suppiger Co., set up the defense that respondent was making use of the patent to restrain the sale of salt tablets in competition with its own sale of unpatented tablets by requiring licensee to use with the patented machines only tablets sold by Morton Salt Co. Defendant moved for summary judgment, which was granted by the District Court. The Court of Appeals for the 7th Circuit reversed (117 Fed. (2d) 968), and denied the motion on the ground that there was no showing on the record before the Court that the use of the leases in question had substantially lessened competition or had tended to create a monopoly. At p. 971 of its opinion, the Circuit Court of Appeals said:

> "• • • Section 3 of the Clayton Act, 15 U.S.C. Sec. 14, upon which defendant-appellee particularly relies, makes unlawful the lease of machinery (either patented or unpatented) on condition that the lessee shall not use the supplies or other commodities of a competitor. However, unlawfulness is made to depend upon a provision which is here important,—where the effect of such lease or such condition may be substantially to lessen competition or tend to create a monopoly in any line of commerce.
>
> Appellant's agreement falls within the condemnation of this statute if its leases substantially lessen competition or tend to create a monopoly. It is in respect to this last requirement that our attention must be focused. In short, does the condition in plaintiff's leases tend to create a monopoly or substantially to lessen competition? • • •"

The Court then cited *Standard Oil Co.* v. *United States*, 283 U. S. 163 to the effect that the existence of a monopoly,

as a result of the defendant's acts, or the fact that competition was actually lessened as a result thereof must be factually proven. It cited the contention of plaintiff that plaintiff's machine was not the only available machine for the deposit of salt tablets of predetermined amount in the canning or other industries; that plaintiff's lessees were permitted by the terms of the lease to purchase and use other machines, and to use in connection with such other machines any salt or salt tablets which they desired, and that the volume of all the salt business was very large, the amount of salt used in the canning field being so small that its complete control would not result in a monopoly of the salt industry. It concluded as follows (p. 972):

> "* * * Due to the District Court's entry of its decree in a summary proceeding, we are not able to determine the monopolistic extent of plaintiff's contract. The court was clearly in error in granting this summary judgment without an inquiry into the facts. Unless the defendant can make 'a definite factual showing of illegality' arising from plaintiff's agreement with its licensee, it is not entitled to judgment of dismissal. The presence of such a factual issue, ordinarily, is a bar to the granting of a summary judgment. * * *"

This Court reversed the Circuit Court of Appeals, but specifically did not decide whether the respondent's leases violated the Clayton Act, holding that it was not necessary to decide that question in an action involving only the rights of a patent owner against an infringer (314 U. S. 490, 494).

The Court below recognized that this Court in the *Morton Salt* case had not passed on the issue as to the

violation of the Clayton Act (R. 30). He quoted, however, extracts from the opinion in *Mercoid Corp.* v. *Mid-Continent Investment Co.* (*supra*) containing statements not necessary to that decision, as indicating a trend on the part of this Court toward the contention of the plaintiff below (R. 31).

However, in *Transwrap Corp.* v. *Stokes Co.* (1947), 329 U. S. 637 decided since the opinion of the Court below was filed, this Court has made it plain that the *Morton* case did not decide any issue involving the anti-trust laws. At p. 641 of its opinion in the *Transwrap* case, this Court says:

> "* * * The requirement that a licensee under a patent use an unpatented material or device with the patent might violate the anti-trust laws but for the attempted protection of the patent. * * * The condemnation of the practice, however, does not depend on such a showing. Though control of the unpatented article or device falls short of a prohibited restraint of trade or monopoly, it will not be sanctioned. Morton Salt Co. *v.* Suppiger Co., supra. * * *"

and at p. 645:

> "* * * It is true that for some purposes the owner of a patent is under disabilities with which owners of other property are not burdened. Thus where the use of unpatented materials is tied to the use of a patent, a court will not lend its aid to enforce the agreement though control of the unpatented article falls short of a prohibited restraint of trade or monopoly. Morton Salt Co. *v.* Suppiger Co., supra. * * *"

The Court below erred in granting summary judgment, therefore, in the absence of a factual showing that the

Lixator and Saltomat leases had effected an unreasonable restraint of trade, or a substantial lessening of competition.

II

The record in this case did not justify the granting of summary judgment.

The Court below, in deference to the decisions of this Court in *Federal Trade Commission* v. *Sinclair Refining Co., supra,* and *Pick Mfg. Co.,* v. *General Motors Corp., supra,* did not hold that the Lixator and Saltomat leases were unlawful *per se,* but based his decision on the fact alleged in the complaint (R. 8) and admitted in defendant's answer (R. 16) that in 1944 defendant, International Salt, sold approximately 119,000 tons of salt having an approximate value of $500,000 for use in said Lixator and Saltomat machines. The finding of the Court on which the judgment below is based is "that a restraint which affects 900 business units in a business aggregating $500,000 per annum is, without more, undue and unreasonable and the lessening of competition on its face substantial" (R. 32).

We submit that this one allegation as to the number of Lixator and Saltomat machines leased and the quantity of salt sold by defendant for use in said machines in a particular year is totally inadequate to sustain the summary judgment, especially in view of the other facts in the record which, for the purposes of this appeal, must be deemed admitted. In this connection, it must be borne in mind that four of the Lixator leases contained no "tying clause," and that in nine of said leases the clause permitting removal of the Lixator in the event of viola-

tion by the lessee of the agreement to use in the Lixator only salt purchased from the lessor is omitted or stricken out. How much of the salt sold by defendant in 1944 to Lixator users was sold to these lessees does not appear, nor does it appear how much of this salt was sold in the form of rock salt to Lixator users, and how much in the form of salt tablets to Saltomat users. Moreover, the record shows that in many instances lessees of the Lixator and of the Saltomat have purchased rock salt and salt tablets for use in such Lixator or Saltomat, respectively, from sources other than the defendant, International Salt (R. 17). The quantity of salt sold by defendant's competitors to defendant's lessees for use in these Lixator and Saltomat machines would be highly pertinent in determining the extent, if any, to which these leases have effected a lessening of competition.

Another factor is the total quantity of salt sold by defendant and other salt manufacturers for use in these and other similar machines, and the percentage of such total sold by defendant, International Salt. The fact that International Salt is the largest producer in the United States of salt for industrial uses (R. 14) does not indicate what percentage of the salt sold for such uses is sold by this defendant, or establish that it dominates or controls the salt industry. That would depend on the number of other salt manufacturers and the quantities sold by them. *B. S. Pearsall Butter Co. v. Federal Trade Commission*, (C.C.A. 7th Circ.) 292 Fed. 720, 722.

These questions the defendant is entitled to have determined on a trial of this action by reason of its denial of the allegations of the complaint, on which the plaintiff has the burden of proof, charging restraint of trade by the defendant and a sustantial lessening of competition

as a result of the Lixator and Saltomat leases (Complaint, R. 5, 7, 8; Answer, R. 15, 16).

Both the Lixator and Saltomat leases contain provisions giving to the lessee the benefit of any price reductions in rock salt or salt tablets. The clause in the Lixator lease is as follows (R. 11):

> "If at any time during the term of this lease a general reduction in price of grades of salt suitable for use in the said Lixate Process Dissolver shall be made, said Lessee shall give said Lessor an opportunity to provide a competitive grade of salt at any such competitive price quoted, and in case said Lessor shall fail or be unable to do so, said Lessee, upon continued payment of the rental herein agreed upon, shall have the privilege of continued use of the said equipment with salt purchased in the open market, until such time as said Lessor shall furnish a suitable grade of salt at the said competitive price."

The Saltomat lease provides (R. 13):

> "If, at any time during the term of this lease, a general reduction in Lessor's price of salt tablets suitable for use in the Depositor(s) shall be made, said Lessor shall provide said Lessee with Salt Tablets at a like price."

It may be true that the fixing of prices is not the only means of violating the anti-trust laws (R. 32 footnote), but in determining whether a particular lease or contract violates these laws the effect on prices is highly relevant. On the facts in this record, so far as the Lixator leases are concerned at any rate, it can only be presumed that they have had no effect in increasing or maintaining the price of salt. In the absence of such an effect, the Court

is not justified in finding, as a matter of law, that there has been an unreasonable restraint of trade or a substantial lessening of competition as a result of these leases. All the allegations of illegality or wrongdoing made in the complaint are denied by defendant, which alleges (without denial on this record) that it had no purpose or intent to create a monopoly in the sale of rock salt or salt tablets, or to restrain trade or commerce in those products, but only to secure for itself the opportunity to meet competitive prices (R. 16).

The record further shows that the defendant, International Salt, has never acted oppressively toward its lessees or prospective lessees; that it has never refused to install a Lixator or a Saltomat because the customer objected to signing a lease on the standard form; that it has in many instances sold Lixators outright where a customer objected to leasing the machine, and that it has never removed or attempted or threatened to remove a Lixator or Saltomat from the possession of a lessee, although in many instances lessees of these machines have purchased rock salt and salt tablets for use in such machines from sources other than the defendant, to the defendant's knowledge (R. 16, 17).

While any of these facts standing alone might not be conclusive in determining whether there has been an unreasonable restraint of trade or a substantial lessening of competition, all of them have a bearing on the question whether the effect of the Lixator and Saltomat leases entered into by the defendant has been unreasonably to restrain trade or commerce in rock salt or salt tablets or substantially to lessen competition or tend to create a monopoly. The presence of all these factors raises issues of fact on which the defendant is entitled to a trial.

The answer also alleges that the rock salt produced by the defendant has a higher average Sodium Chloride content than the rock salt produced by other mining concerns, and that rock salt of a lower Sodium Chloride content contains more insoluble impurities which interfere with the operation of the Lixator machine and prevent it from operating in a manner satisfactory to the lessee; also that the use of the less pure salt produced by other concerns affects adversely the amount of concentrated brine which the Lixator produces (R. 17, R. 18).

As to the Saltomat machine, the answer also alleges that the salt tablets manufactured by defendant are made from high purity evaporated salt made especially to meet the requirements of the canning industry, and contain a minimum of impurities such as Calcium Sulphate which, when used in the processing of vegetables, causes a hardening of the skin of the vegetable which is objectionable to the consumer; also that the container used by the defendant, International Salt, for its salt tablets are especially prepared with a glazed interior surface to prevent the salt tablets, when moist, sticking to the side of the container and picking up impurities which are, in turn, transmitted into the can of vegetables in which the salt tablets are deposited (R. 18, 19).

These allegations are made in defendant's answer in support of its contention that the restrictive clauses in the leases are necessary for the satisfactory operation of the machines and the protection of the defendant's goodwill.

The Court below in his opinion twice calls attention to the fact that these allegations of the answer are not supported by affidavit (R. 34, 35). The plaintiff submitted no affidavits in support of the allegations of the complaint

charging violation by the defendant of the anti-trust laws. There was no occasion, therefore, for the defendant to support by affidavit facts which had already been pleaded in the answer. The pleading of these allegations was sufficient to raise an issue and to permit the facts alleged to be proven on the trial. On a motion for summary judgment the court is not concerned with deciding questions of fact or questions of credibility.

> "If there is a genuine issue as to a material fact, the case will go to trial".
>
> *3 Moore's Federal Practice*, §56.01, p. 3175.

The lower court further held (R. 35) that these allegations showing that the use of the defendant's salt is necessary to the satisfactory operation of the Lixator and Saltomat machines, if true, did not constitute a valid defense, citing *International Business Machines v. United States, supra*, at p. 138. The defendant in that case did not contend that cards suitable for use in the defendant's machines and meeting all the requirements of its machines could not be obtained from others than the defendant. On the contrary, it affirmatively appeared by stipulation that others were capable of manufacturing cards suitable for use in defendant's machines, and that paper required for that purpose could be obtained from the manufacturers who supplied defendant (298 U. S. at p. 139).

The answer in the case at bar alleges, and for the purposes of the record it is admitted, that only the salt manufactured by the defendant can be used satisfactorily in defendant's machines because of its purity and high Sodium Chloride content (R. 18, 19). We do not contend, of course, that these allegations have been proven, but

they do raise an issue as to the reasonableness of the restrictions in the lease agreements on which the defendant is entitled to a trial. (*Pick Mfg. Co.* v. *General Motors Corp., supra; American Optical Co. v. New Jersey Optical Co.*, 58 Fed. (Sup.) 601, 605).

The anti-trust laws are criminal statutes. Violators may be fined and imprisoned, and are also subject to severe penalties such as claims for treble damages. It is not in conformity with our system of jurisprudence that a defendant should be found guilty of a violation of these statutes without a full and fair opportunity, upon a trial of the action, to introduce any evidence bearing on the question whether there has been a restraint of trade or lessening of competition and, if so, whether it is of such character and extent as to come within the prohibition of the anti-trust statutes. The judgment in the case at bar, while in form a summary judgment, is in reality a judgment on the pleadings. The finding that the Anti-Trust Laws have been violated is not justified by the scanty record before the District Court.

III

The provisions of Paragraph VI of the judgment should, in any event, be modified.

Paragraph VI of the judgment reads as follows:

> "Defendant International Salt is directed to offer to lease or sell or license the use of the Lixator or Saltomat Machines, or any other machine which is then being or about to be offered or shall have been offered by such defendant in the United States

embodying inventions covered by any of the patents referred to in Paragraph II hereof, to any applicant on non-discriminatory terms and conditions; provided that

(a) A machine or machines is or are available for such purposes and

(b) Defendant shall not be required to make such offer unless it is offering, about to offer, or has offered such machines for lease or sale or license within the United States and at any time the defendant may discontinue the business of renting or selling or licensing the use of such machines; and

(c) Such sale or lease or license is not required to be made without cash payment or security to any person not having proper credit rating, and

(d) The rental or sale price or license royalty may differ as to different types and sizes of machines and from time to time so long as the rental or sale price or royalty at any one time is uniform as to each size or type of machine. The terms of this paragraph shall apply to all future contracts and modifications of existing contracts. Any person with whom defendant International Salt now has a lease agreement relating to the Lixator or Saltomat machines may elect to retain his rights under the existing lease or to enter into a lease or sale or license contract with defendant International Salt in accordance with the provisions of this paragraph."

We urge upon the Court that the judgment be reversed, but if there should be an affirmance the provisions of Paragraph VI should, in any event, be modified.

Under the provisions of this paragraph, if the defendant sells or leases or licenses the use of a Lixator or Saltomat to one applicant, it must sell or lease or license the use

of such machine, as the case may be, to any subsequent applicant on the same terms. The sales price or rental or royalty must be the same to all purchasers, lessors, or licensees. The only exception is that it may demand cash payment or security from any applicant not having a proper credit rating, and that it need not accept an applicant's offer if no machine is available. Once having sold, leased, or licensed the use of a machine, the only way that defendant may relieve itself of the obligation to sell, lease, or license future applicants is to get rid of all its available machines and discontinue that department of its business.

A Federal Court, in framing a decree in an anti-trust action, exercises a jurisdiction which is "remedial, not punitive" (*United States* v. *American Can Co.*, 234 Fed. 1019), and "is to be exercised according to the general principles which govern the granting of equitable relief" (*DeBeers Consolidated Mines Ltd.* v. *United States*, 325 U. S. 212, 218).

In *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 412, the decree forbade any disposition or transfer by the defendant of patented glassware machinery, except by an outright sale. This provision of the decree was eliminated by this Court on the ground that it, in effect, confiscated the defendant's property and went beyond what was necessary to accomplish the purpose of the decree, which was to dissolve the existing combination and prevent future combinations of like character.

In *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 728, Government counsel asked this Court to direct the inclusion in the decree of a requirement that defendant, Soft-Lite Co., file with the District Court a written instrument providing that it would sell its product without discrimination to any person offering to pay cash

therefor. This Court refused to grant the Government request, and indicated its unwillingness, except in the case of absolute necessity, to deprive the defendant of the privilege of selecting its customers.

In the case at bar there is no combination or conspiracy to be dissolved or broken up, and there is a total absence of proof of any oppressive conduct by the defendant toward the lessees of its machines. The paragraph objected to was inserted in the judgment ostensibly for the purpose of protecting existing or future holders of Lixator or Saltomat leases against discriminatory conduct on the part of defendant, if they elected to purchase salt from defendant's competitors. In the first place, there is no reason to assume that any such discriminatory measures would be taken by defendant. The record shows, in fact, that it has never taken advantage of the removal clause in the Lixator or Saltomat leases even though, in many instances, lessees have purchased salt from others to defendant's knowledge (R. 17). Nor has defendant ever refused to install a Lixator or Saltomat, because a customer objected to signing a lease containing the restrictive covenant complained of by plaintiff.

Moreover, full protection against discrimination could be afforded to lessees by eliminating the present Paragraph VI of the decree, and adding at the end of Paragraph IV, containing the injunctive provisions, a new clause (g) enjoining the defendant, its directors, officers, etc. as in Paragraph IV (R. 37):

> "(g) From refusing to sell, lease or license the use of any such machine to any person, firm or corporation, or from discriminating in the terms of any contract of sale, lease or license of any such machine with any person, firm or corporation,

against the prospective buyer, lessee or licensee on the ground that he has used or dealt in, or intends or proposes to use or deal in, salt not manufactured or sold by the defendant International Salt."

A substantially similar clause was in the form of judgment proposed by the defendant in the District Court, but was not adopted by that Court. Furthermore the District Court has retained jurisdiction of the cause (R. 39), and if it should develop that further protective provisions are necessary they can be incorporated in the decree on application of the Government at any time.

Paragraph VI of the judgment would be a real handicap to the defendant, International Salt, in the conduct of its business. For instance, in some sections of the country, sellers of salt have established the practice of furnishing their customers with a rock salt dissolver which performs a function similar to that of the Lixator, and which is furnished at a nominal rental or without charge, the purpose being to build up good-will with the customer and acquire new business. Defendant will not be able to compete in this territory, if Paragraph VI of the judgment remains in effect, as it would be required to charge a uniform rate for the rental of the Lixator, and could not reduce its rate to meet competition in a particular territory. The result would be to lessen competition in those sections, rather than to maintain or increase it in accordance with the purpose of the Anti-Trust Laws.

The Clayton Act itself, 15 U.S.C. Sec. 13(b), permits a seller charged with price discrimination to rebut the charge by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers

was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor. The judgment in this case should not prevent the defendant from exercising or practicing a type of discrimination which the anti-trust statutes recognize as justifiable and legal.

CONCLUSION

The judgment of the District Court should be reversed, the motion for summary judgment denied, and the cause remanded to the District Court for trial. If the judgment should be affirmed, the provisions of Paragraph VI should be modified as urged by the appellant.

Respectfully submitted,

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